

## UNITED STATES DISTRICT COURT

Northern District of California

San Francisco Division

IN RE HULU PRIVACY LITIGATION

No. C 11-03764 LB

ORDER DISMISSING CLAIMS TWO  
THROUGH SEVEN, ORDERING  
FURTHER BRIEFING ON STANDING  
ONLY, AND SETTING FURTHER  
HEARING**I. INTRODUCTION**

In this putative class action, viewers of Hulu's online video content allege that Hulu wrongfully disclosed their video viewing selections and personal identification information to third parties such as online ad networks, metrics companies (meaning, companies that track data), and social networks, in violation of the Video Privacy Protection Act, 18 U.S.C. § 2710. First Amended Consolidated Class Action Complaint, ECF No. 37 at 18.<sup>1</sup> Plaintiffs raised six other claims but elected not to pursue them. *See* Opposition to Motion to Dismiss, ECF No. 58 at 6 n.1. Defendant Hulu moves to dismiss under Federal Rule of Civil Procedure 12(b)(1) on the ground that Plaintiffs lack standing. Hulu also argues that the court should dismiss under Rule 12(b)(6) for failure to state a claim because (1) Hulu is not a "Video Tape Service Provider" and thus is not liable under the Act, (2) any disclosures were incident to the ordinary course of Hulu's business and not covered by the Act, and

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<sup>1</sup> Citations are to the Electronic Case File ("ECF") with pin cites to the electronic page number at the top of the document.

(3) Plaintiffs are not “consumers” within the meaning of the Act. Motion to Dismiss, ECF No. 49. Following a hearing on June 7, 2012, and for the reasons stated below, the court dismisses claims two, three, five, six, and seven without prejudice, and claim four with prejudice, orders further briefing on the standing issue, and sets a further hearing for August 23, 2012, at 11:00 a.m.

## II. PROCEDURAL HISTORY, LIVE CLAIMS, SUBJECT-MATTER JURISDICTION AND VENUE, AND ALLEGATIONS IN COMPLAINT

### A. Procedural History

On July 29, 2011, Plaintiffs Garvey and Tsan filed a complaint, and on September 2, 2011, they filed an amended complaint, in *Garvey v. Kissmetrics et al.*, No. C 11-03764 LB. *See* ECF Nos. 1 and 13. On September 14, 2011, Plaintiffs Couch, Garza, Jauregui, and Moncada filed a complaint in the Central District of California in *Couch v. Space Pencil et al.*, No. C 11-05606 LB, and the case was transferred to this district on September 14, 2011. *See Couch*, 11-05606 LB, ECF Nos. 1 and 48. The *Garvey* and *Couch* complaints both named Space Pencil (doing business as Kissmetrics) and Hulu as defendants, but the Plaintiffs voluntarily dismissed their claims against Space Pencil, which remains a defendant in a related case. *See Garvey*, No. C 11-03764 LB, ECF No. 31; *Couch*, No. 11-05606 LB, ECF No. 22; *Kim v. Space Pencil, Inc.*, C 11-03796 LB. The parties stipulated to, and the court ordered, the consolidation of the *Garvey* and *Couch* cases into this consolidated action now captioned “*In re Hulu Privacy Litigation.*” ECF Nos. 38, 39. On February 15, 2012, Plaintiffs filed the pending First Amended Consolidated Class Action Complaint (“FAC”) naming only Hulu as a defendant. ECF No. 37.<sup>2</sup> The FAC defines the class period as March 4, 2011 to July 28, 2011 and defines a “Class” and a “Video Subclass:” (1) Class: “All individuals and entities in the United States who visited Hulu.com during the Class Period;” and (2) Video Subclass: “All individuals and entities in the United States who visited Hulu.com during the Class Period and viewed video content.” *Id.* at 15, ¶¶ 96-97.

### B. Live Claims

The FAC has seven claims: (1) knowing and unauthorized transmission of Class Members’ video viewing selections and personal identification information to third parties in violation of the Video

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<sup>2</sup> The caption still names Kissmetrics, but only Hulu is a defendant.

1 Privacy Protection Act; (2) trespass to chattel in violation of state law; (3) wrongful access of data in  
 2 violation of California Penal Code § 502; (4) wrongful access of Class Members' computers in  
 3 violation of 18 U.S.C. § 1030; (5) violations of California's unfair competition law, codified in  
 4 California Business and Professions Code § 17200, *et seq.*; (6) violation of Class Members' right to  
 5 privacy as codified in the California Constitution, Article I, section 1; and (7) negligent capture,  
 6 transmission, and sharing of Class Members' personal information and publishing a misleading  
 7 privacy policy. *Id.* at 18-29. In their opposition to Hulu's motion to dismiss, Plaintiffs elect not to  
 8 pursue claims two through seven:

9 Due to uncertainties in the state of the law regarding certification of a nationwide class under the  
 10 California Consumer Legal Remedies Act and the California Unfair Competition Law, including  
 11 the application of *Mazza v. Honda Co., Inc.*, 666 F.3d 581 (9th Cir. 2012) and the resulting  
 12 complications of a nationwide statutory class and potential state consumer subclasses, Plaintiffs  
 13 elect, at this time, not to pursue these claims. Further, in light of Plaintiffs' continuing  
 investigation, through counsel, of certain underlying, common issues of fact regarding Plaintiffs'  
 14 claims for trespass to chattels, violations of the California Computer Crime Law, the Computer  
 15 Fraud and Abuse Act, the California Constitution, and negligence claims, Plaintiffs elect not to  
 16 pursue those claims at this time.

17 Opposition, ECF No. 58 at 6 n.1.

18 In its reply, Hulu argues that this is abandonment that requires dismissal with prejudice. Reply,  
 19 ECF No. 60 at 5 (citing *Green Desert Oil Grp. v. BP W. Coast Prods.*, No. C 11-02087 CRB, 2012  
 20 WL 555045, at \*2 (N.D. Cal. Feb. 21, 2012); *In re Facebook Privacy Litig.*, No. C 10-02389 JW,  
 21 2011 WL 6176208, at \*2 n.5 (N.D. Cal. Nov. 22, 2011); *In re TFT-LCD (Flat Panel) Antitrust*  
 22 *Litig.*, 586 F. Supp. 2d 1109, 1131 (N.D. Cal. 2008)).

23 Plaintiffs' statement – that they “elect . . . at this time” not to pursue claims two through seven –  
 24 is equivocal and is not a concession on the merits of Hulu's motion to dismiss. *Cf.* N.D. Cal. Civil  
 25 Local R. 7-3(b) (a party against whom a motion is directed must file a statement of nonopposition if  
 26 it does not oppose the motion). And it cannot be intended as a voluntary dismissal of the claims. *Cf.*  
 27 Fed. R. Civ. P. 41(a)(1) (plaintiff may voluntarily dismiss an *action* as opposed to only some claims  
 28 against a defendant); *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1392 (9th Cir. 1988)  
 (plaintiff may not use Rule 41(a) as a mechanism for dismissing only certain claims; instead, the  
 proper procedure is to amend the complaint). But the court holds, and Plaintiffs did not dispute at  
 the June 7 hearing, that Plaintiffs' decision not to pursue these claims is abandonment of the claims

1 in this federal action.

2 The question is whether this court should dismiss claims two through seven with or without  
3 prejudice. The cases that Hulu cites to support a dismissal with prejudice generally involve  
4 plaintiffs who apparently did not address a defendant's motion to dismiss at all, and thus the court  
5 deemed the claims abandoned and dismissed them with prejudice. *See Green Desert Oil*, 2012 WL  
6 555045, at \*2 (complaint alleged many breaches of contract; defendant moved to dismiss them all;  
7 plaintiffs defended only three of the alleged breaches in their opposition); *In re TFT-LCD (Flat*  
8 *Panel) Antitrust Litig.*, 585 F. Supp. 2d at 1131 (defendant manufacturers, sellers, and distributors of  
9 TFT-LCD flat panels moved to dismiss plaintiffs' Pennsylvania common law antitrust claims on the  
10 ground that Pennsylvania law did not authorize damages sustained from antitrust violations;  
11 plaintiffs' opposition did not address the claim or defendants' arguments); *see also Jenkins v.*  
12 *County of Riverside*, 398 F.3d 1093, 1095 n.4 (9th Cir. 2005) (abandoned two claims by not raising  
13 them in opposition to the County's motion for summary judgment).

14 Hulu also cites *In Re Facebook Privacy Litigation*, which is similar. There, plaintiffs did not  
15 address their Wiretap Act claim in their opposition to Facebook's motion to dismiss that claim and  
16 said at oral argument only that they intended to "reserve" their claims. 2011 WL 6176208, at \*2 n.6.  
17 The court found that vague statement insufficient given their blatant failure to respond to  
18 Facebook's motion. *Id.* Also, the court previously had given leave to amend. *Id.* at \*6.

19 This situation is different, at least as to the California state claims. Plaintiffs are not maintaining  
20 radio silence about their claims or ignoring Hulu's opposition completely. Instead, they are not  
21 certain that they can certify a nationwide class in a case that includes California state claims. Given  
22 that federal policy favors determination of cases on the merits, the court cannot say on this record  
23 that it should dismiss the state claims with prejudice.

24 The court's inquiry is different with claim four, a federal claim that alleges wrongful access of  
25 Class Members' computers in violation of 18 U.S.C. § 1030. At oral argument, Plaintiffs offered no  
26 reason why the court should not dismiss this claim with prejudice. And so the court does.

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1 **C. Jurisdiction and Venue**

2 The parties agree that venue is proper in this district. Joint Case Management Conference  
3 Statement, ECF No. 48 at 1. The court has jurisdiction under 28 U.S.C. § 1331 because the case  
4 involves a claim under a federal statute.

5 **D. Allegations in Complaint Relevant to Remaining Federal Claim and Standing**

6 **1. Hulu's Product**

7 Hulu operates a website called Hulu.com that provides video content, both previously released  
8 and posted and originally developed. ECF No. 37, ¶¶ 1, 52, 114. The programs include news,  
9 entertainment, educational, and general interest programs. *Id.* ¶ 114.

10 **2. Plaintiffs' Use of Hulu.com**

11 Plaintiffs and Class Members used their Internet-connected computers and browsers to visit  
12 hulu.com and view video content. *Id.* ¶¶ 1, 52. They were renters, purchasers, and/or subscribers of  
13 goods and/or services from Hulu and so were consumers as defined in the Video Privacy Protection  
14 Act. *Id.* ¶ 115.

15 **3. Plaintiffs' Interests**

16 Plaintiffs value their privacy while web-browsing; they do not want to be tracked online; their  
17 web browsing (including their viewing choices) involves personal information that is private; it is  
18 their decision to disclose (or not) information when they view a web page; and they expect that the  
19 websites they use and "the third parties utilized by those websites will not transmit code that  
20 repurposes . . . software . . . to perform unintended functions, such as tracking and circumvention of  
21 privacy protection[s]" in Plaintiffs' software. *See id.* ¶¶ 15-28.

22 **4. Hulu's Alleged Unauthorized Tracking and Sharing of Users' Video Viewing Details**

23 Hulu allowed a metrics company called KISSmetrics to place code containing tracking  
24 identifiers on Plaintiffs' computers in the browser cache, Adobe Flash local storage, or DOM local  
25 storage. *Id.* ¶¶ 30-32, 34-51, 69. This code allegedly "respawned" or "resurrected" previously-  
26 deleted cookies. *Id.* ¶ 40. This code was "inescapable" and allowed Plaintiffs' data to be  
27 "retained . . . so that they could be tracked over long periods of time and across multiple websites,  
28 regardless of whether they were registered and logged in." *Id.* ¶ 69. As a result, when Class

1 Members viewed video content on Hulu.com, Hulu transmitted their video viewing choices and  
2 personally identifiable information to third parties without obtaining their written consent before the  
3 disclosure. *Id.* ¶¶ 52, 59, 69, 116. The third parties included online ad networks, metrics companies,  
4 and social networks such as Scorecard Research (“Scorecard”) (an online market research  
5 company), Facebook (the online social network), DoubleClick (an online ad network), Google  
6 Analytics (an online web analytics company), and QuantCast (an online ad network and web  
7 analytics company). *Id.* ¶¶ 52-53, 116.

8 The information transmitted to Scorecard and Facebook included information that identified  
9 Plaintiffs and Class Members personally. *Id.* ¶ 53. As to Facebook, Hulu included their Facebook  
10 IDs, connecting the video content information to Facebook’s personally identifiable user registration  
11 information. *Id.* ¶ 58. As to Scorecard, Hulu provided Plaintiffs’ “Hulu profile identifiers” linked to  
12 their “individual Hulu profile pages that included name, location, preference information designated  
13 by the user as private, and Hulu username (which, in the case of many individuals, is the same  
14 screen name used in other online environments.)” *Id.* ¶ 54. Scorecard stored the Hulu ID  
15 information in a cookie named “b.scorecardresearch.com” and stored the video information in a  
16 cookie named “beacon.scorecardresearch.com.” *Id.* ¶ 55. Scorecard also set its own unique  
17 identifier tied to these two cookies. *Id.* Scorecard’s cookies were unencrypted, so any intruder who  
18 gained access to a Class Member’s computer could “engage in a trivial exploit to view the profile  
19 and perform a ‘screen scrape’ copy of that person’s profile page. *Id.* ¶ 56. Hulu’s and Scorecard’s  
20 practice of sharing user profile IDs and storing them in cookies is a severe failure to observe basic  
21 security standards in the handling of user information. *Id.* ¶ 58.

22 Plaintiffs and Class Members “reasonably expected that Hulu would not disclose their video  
23 and/or video service requests and their identities to social networks and online ad/metrics networks,”  
24 and they “did not authorize or otherwise consent to” such disclosures. *Id.* ¶¶ 59-60.

## 25 **5. Hulu’s Terms of Use and Privacy Policy**

26 As a condition of using Hulu, Plaintiffs agreed to Hulu’s terms of use and privacy policy.  
27 Plaintiffs reference the policy in the complaint, and Hulu attached the November 17, 2010 privacy  
28 policy, the updated June 30, 2011 policy, and the terms of use to its motion to dismiss. Robinson

Decl., Exs. A-C, ECF Nos. 50-1 to 50-3. Because Plaintiffs reference the policy in the complaint and do not question the authenticity of the documents (and indeed cite them), the court considers them. *See Bell Atlantic v. Twombly*, 550 U.S. 544, 568 n.13 (2007); *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds*, *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1127 (9th Cir. 2002).

### III. DISCUSSION

Plaintiffs allege that Hulu “knowingly and without . . . [their] consent disclosed to third parties . . . [their] video viewing selections and personally identifiable information, knowing that such disclosure included the disclosure of [their] personally identifying information . . . and their requests for and/or obtaining of specific video materials and/or services from Hulu,” in violation of the Video Privacy Protection Act (“VPPA”), 18 U.S.C. § 2710(b)(1). *Id.* ¶¶ 116-17.

The VPPA prohibits a “video tape service provider” from (1) knowingly disclosing to any person (2) personally identifiable information concerning any consumer of such provider (3) except for certain disclosures – like to the consumer or law enforcement – allowed under section 2710(b)(2). 18 U.S.C. § 2710. “‘Personally identifiable information’ includes information which identifies a person as having requested or obtained specific video materials or services.” *Id.* § 2710(a)(3).

Section 2710(c)(1) provides a private federal right of action to “any person aggrieved by any act of a person in violation of this section.” Under section 2710(c)(2), the federal court may award (A) actual damages but not less than liquidated damages of \$2,500, (B) punitive damages, (C) reasonable attorneys’ fees and litigation costs, and (D) preliminary and equitable relief that the court determines is appropriate.

Hulu first moves to dismiss under Federal Rule of Civil Procedure 12(b)(1), arguing that Plaintiffs lack standing. Motion to Dismiss, ECF No. 49 at 12-15. Hulu also moves for dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim because (1) Hulu is not a “Video Tape Service Provider” and thus is not liable under the Act, (2) any disclosures were incident to the ordinary course of Hulu’s business and are not covered by the Act, and (3) Plaintiffs are not “consumers” within the meaning of the Act. *Id.* at 21-24. The court addresses only the standing issue now and defers consideration of the 12(b)(6) motion until the August 23, 2012



1 hearing.

2 Hulu alleges that Plaintiffs do not have standing because sharing information is not a loss that  
3 conveys standing. *Id.* at 13. Plaintiffs respond that they have standing because the VPPA's private  
4 right of action conveys standing. Opposition, ECF No. 58 at 8-9 (collecting cases). Hulu counters  
5 that the Supreme Court is considering a case that may eliminate statutory standing as a stand-alone  
6 basis for establishing a case or controversy. Reply, ECF No. 60 at 5-7 (arguing also that if it does,  
7 Plaintiffs' failure to respond to Hulu's other standing arguments in this briefing round should  
8 preclude their arguing it in any supplemental briefing) (*citing First Am. Fin. Corp. v. Edwards*, 131  
9 S. Ct. 3022 (June 20, 2011)). The court finds standing under current case law because the VPPA  
10 provides Plaintiffs with a right to judicial relief, but orders additional briefing because the pending  
11 Supreme Court case may alter this analysis. The court finds that Plaintiffs alleged that their rights  
12 were violated with sufficient particularity.

13 **A. Legal Standard**

14 Standing pertains to the court's subject-matter jurisdiction and thus is properly raised in a Rule  
15 12(b)(1) motion to dismiss. *See Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122  
16 (9th Cir. 2010). The party asserting a claim has the burden to establish standing, and the court  
17 presumes lack of jurisdiction unless the claimant proves otherwise. *See Kokkonen v. Guardian Life*  
18 *Ins. Co. of America*, 511 U.S. 375, 376-78 (1994); *Colwell v. Dept. of Health and Human Servs.*,  
19 558 F.3d 1112, 1121 (9th Cir. 2009). In a facial attack (like this one) on the sufficiency of the  
20 complaint's allegations to establish standing, the court "must accept as true all material allegations  
21 of the complaint and must construe the complaint in favor of the complaining party." *Graham v.*  
22 *FEMA*, 149 F.3d 997, 1001 (9th Cir. 1998) (*quoting Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

23 The doctrine of standing encompasses constitutional requirements and prudential considerations.  
24 *See Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454  
25 U.S. 464, 471 (1982); *Sahni v. American Diversified Partners*, 83 F.3d 1054, 1057 (9th Cir. 1996).

26 Article III gives the federal courts jurisdiction only over cases or controversies. *See Whitmore v.*  
27 *Arkansas*, 495 U.S. 149, 154-55 (1990). Establishing standing under Article III requires the  
28 following for each claim: (1) the party must suffer an actual or threatened injury; (2) the injury must



1 be fairly traceable to the challenged conduct; and (3) it is likely (as opposed to merely speculative)  
2 that a favorable decision will redress or prevent the injury. *See Friends of the Earth, Inc. v. Laidlaw*  
3 *Envtl. Servs. (TOC)*, 528 U.S. 167, 180-81, 185 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S.  
4 555, 560-61 (1992); *Valley Forge Christian College*, 454 U.S. at 472; *Sahni*, 83 F.3d at 1057. “In a  
5 class action, standing is satisfied if at least one named plaintiff meets the requirements.” *See Bates*  
6 *v. United Parcel Serv.*, 511 F.3d 974, 985 (9th Cir. 2007).

7 Prudential considerations require the following: (1) a party must assert his own legal rights and  
8 interests, not those of others; (2) courts will not adjudicate “generalized grievances;” and (3) a  
9 party’s claims must fall within the zone of interests that is protected or regulated by the statute or  
10 constitutional guarantee in question. *See Valley Forge Christian College*, 454 U.S. at 474-75;  
11 *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1122 (9th Cir. 2009).

## 12 **B. Analysis**

13 The VPPA provides a private right of action to any person aggrieved by unlawful disclosure of  
14 information under the statute. *See* 18 U.S.C. § 2710(c)(1). A court may award actual damages but  
15 not less than \$2,500 statutory liquidated damages, punitive damages, reasonable fees and costs, and  
16 other preliminary and equitable relief. *Id.* § 2710(c)(2). Plaintiffs point out, and Hulu does not  
17 dispute, that the Ninth Circuit recognizes that a plaintiff satisfies Article III’s injury-in-fact  
18 requirement by alleging a violation of a statutorily-created legal right. ECF No. 58 at 8-9 (collecting  
19 cases); ECF No. 60 at 7.

20 For example, in *Jewel v. National Security Agency*, the plaintiff in a putative class action alleged  
21 that the federal government used surveillance devices attached to AT&T’s network to intercept the  
22 communications of class members, thereby violating three surveillance statutes: the Foreign  
23 Intelligence Surveillance Act (“FISA”), 50 U.S.C. § 1801 *et seq.*, the Electronic Communications  
24 Privacy Act (“ECPA”), 18 U.S.C. § 2510 *et seq.*, and the Stored Communications Act (“SCA”), 18  
25 U.S.C. § 2710 *et seq.* 673 F.3d 902, 905-06 (9th Cir. 2011). All three statutes explicitly create  
26 private rights of action for claims of illegal surveillance. *Id.* at 908; *see, e.g.* 50 U.S.C. § 2520  
27 (FISA private right of action to any person whose communication is intercepted, disclosed, or  
28 intentionally used). The *Jewel* court concluded that Jewel alleged concrete injury sufficiently. 673

1 F.3d at 908.

2 Similarly, in *Edwards v. First American Corporation*, a home purchaser alleged that her  
3 settlement agent illegally referred her title insurance business to First American pursuant to an  
4 exclusive agency agreement in violation of the anti-kickback provisions of the Real Estate  
5 Settlement Procedures Act (“RESPA”), 12 U.S.C. § 2607. 610 F.3d 514, 515-16 (9th Cir. 2010),  
6 *cert. granted*, 113 S. Ct. 3022 (June 20, 2011). Under RESPA, “[a] person who is charged for a  
7 settlement service involved in a [RESPA] violation is entitled to three times the amount of *any*  
8 charge paid” (as opposed to just overcharges). *Id.* at 517 (emphasis in original) (citing 12 U.S.C.  
9 § 2607(d)(2)). The court concluded that the home purchaser established an injury that satisfied  
10 Article III. *Id.*

11 Courts have applied this principle – that Congress can define a “legal right, the invasion of  
12 which establishes standing,” *see Edwards*, 610 F.3d at 517 – to find standing when a consumer  
13 alleges a violation of a consumer privacy statute with a private right of action. For example, the  
14 Driver’s Privacy Protection Act prohibits certain uses and disclosures of private information  
15 provided to DMVs in connection with motor vehicle records. *See* 18 U.S.C. § 2721(a) and (b);  
16 *Graczyk v. West Pub. Co.*, 660 F.3d 275, 277 (7<sup>th</sup> Cir. 2011). Under the statute, a plaintiff may file a  
17 federal lawsuit against someone who improperly obtains the plaintiff’s private information. *See* 18  
18 U.S.C. § 2724(a). No further injury is necessary to establish standing. *See Graczyk*, 660 F.3d at  
19 278. Similarly, the Cable Communications Policy Act, 47 U.S.C. §§ 421-561, contains privacy  
20 measures governing a cable company’s use of the cable system to collect personally identifiable  
21 information, and it permits cable subscribers to bring a civil action to enforce the privacy provisions.  
22 *See Klimas v. Comcast Cable Comms., Inc.*, 465 F.3d 271, 275-76 (6<sup>th</sup> Cir. 2006). Alleging a  
23 privacy violation under the Act constitutes standing even absent economic harm. *Id.*

24 Under current law, then, Plaintiffs establish an injury (and standing) by alleging a violation of a  
25 statute. Hulu counters that the Supreme Court’s decision this term in *Edwards* will clarify whether  
26 alleging only a statutory violation is sufficient injury-in-fact to convey standing. Reply, ECF No. 60  
27 at 7.

28 The court observes that *Edwards* involved no economic injury because Ohio law fixed the fees

1 that title insurers could charge. 610 F.3d at 516. By contrast, release of private information might  
2 be the additional harm that may make a statutory violation sufficient to convey standing. Still, the  
3 Court's decision in *Edwards* likely will alter the standing analysis. Accordingly, the court defers  
4 ruling on the motion to dismiss and sets a further briefing schedule below limited solely to this  
5 standing issue. The undersigned rejects Hulu's argument that Plaintiffs' reliance on their statutory  
6 standing argument waives their right to respond further in supplemental briefing.

7 Hulu also argues that Plaintiffs did not allege the particularized injury needed to establish  
8 standing because they did not "allege facts showing that Hulu violated the VPPA by disclosing  
9 information that ties the identity of each Plaintiff to the video(s) that he or she viewed on hulu.com."  
10 ECF No. 60 at 7; *see Jewel*, 673 F.3d at 909 ("The critical question is whether [the plaintiff] 'has  
11 alleged such a personal stake in the outcome of the controversy as to warrant . . . invocation of  
12 federal court jurisdiction'") (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)). But  
13 the complaint does have allegations about injury:

- 14 • When Class Members viewed video content on Hulu's website, Hulu transmitted their video  
15 viewing choices and personally identifiable information to third parties without Class  
Members' written consent before disclosure. ECF No. 37, ¶¶ 52, 58-60, 69, 116.
- 16 • The third parties included online ad networks, metrics companies, and social networks such  
17 as Scorecard Research, Facebook, DoubleClick, Google Analytics, and QuantCast. *Id.* ¶¶ 53,  
116.
- 18 • Hulu's transmissions of video viewing information to Scorecard and Facebook included  
19 information that personally identified Plaintiffs and Class Members. *Id.* ¶ 53.
- 20 • As to Facebook, the information included "Plaintiffs' and Class Members' Facebook IDs,  
21 [which connected] the video content information to Facebook's personally identifiable user  
22 registration information." *Id.* ¶ 58.
- 23 • As to Scorecard, Hulu provided the Hulu profile identifiers linked to their individual Hulu  
24 profile pages that included identifying information, preference information designated as  
25 private, and Hulu username. *Id.* ¶¶ 53-54, 58.

26 In *Jewel*, the Ninth Circuit concluded that the plaintiff's allegations were sufficiently  
27 particularized where she alleged that the government had intercepted the communications "of  
28 practically every American who uses the phone system or the Internet, including Plaintiffs and class  
members in an unprecedented suspicionless general search through the nation's communications  
network." *Jewel*, 673 F.3d at 909-11. The court finds Plaintiffs' allegations here sufficiently

1 particularized.

2 **IV. CONCLUSION**

3 The court dismisses state claims two, three, five, six, and seven without prejudice. The court  
4 dismisses claim four – a federal claim that alleges wrongful access of Class Members’ computers in  
5 violation of 18 U.S.C. § 1030, *et seq.* – with prejudice.

6 As to the remaining claim one, the court holds that under the law as it stands now, Plaintiffs  
7 alleged standing sufficiently. The court nonetheless orders further briefing because the Supreme  
8 Court’s decision in *Edwards* likely will alter the standing analysis. Accordingly, the court defers  
9 ruling on the 12(b)(1) motion challenging standing and sets the following schedule:

<u>Event</u>	<u>Date</u>
Hulu’s seven-page supplemental brief	July 19, 2012
Plaintiffs’ seven-page response	August 2, 2012
Hulu’s optional 3-page reply	August 9, 2012
Further argument	August 23, 2012, 11 a.m.

15 The parties may alter the dates (but not the time period between the conclusion of briefing and  
16 argument) if the timing of the *Edwards* opinion makes the schedule too ambitious.

17 At the parties’ request, and because jurisdiction is a threshold issue, the court defers ruling on  
18 Hulu’s Rule 12(b)(6) motion to dismiss for failure to state a claim.

19 **IT IS SO ORDERED.**

20 Dated: June 11, 2012



21 LAUREL BEELER  
22 United States Magistrate Judge  
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